Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

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Jeremiah W. (Jay) Nixon, Attorney General,
State of Missouri, et al.,
Petitioners,

v.

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Respondent.

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, based on the Federal Arbitration Act, 9 U.S.C. §1, a United States district court has subject matter jurisdiction over a claim that a state civil rights agency cannot enforce state anti-discrimination laws when the allegedly discriminatory acts were the subject of arbitration between an employer and its employee?

2. Whether, based on the Federal Arbitration Act, 9 U.S.C. §1, an employee's arbitration of an employment-related dispute with an employer, done pursuant to an industry-wide requirement that employees in that field agree to arbitration, bars a state civil rights enforcement agency, as the plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as back pay and damages?

## PARTIES TO THE PROCEEDING

Petitioners are Jeremiah W. (Jay) Nixon, Attorney General for the State of Missouri; Assistant Attorney General Keith D. Halcomb; Missouri Commission on Human Rights members Gerald P. Greiman, Geraldine Johnson, Sterling Adams, and Nancy Reynolds, and the Commission's Executive Director, Donna Cavitte.[1]

Respondent is Merrill Lynch, Pierce, Fenner & Smith, Inc.

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[1] The named complainant in the underlying commission proceeding, Anthony Hoskins, is not a party here nor in that proceeding.

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# PETITION FOR WRIT OF CERTIORARI

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## OPINIONS BELOW

The opinion of the court of appeals (Appendix [App.] App. A-15), entered on April 24, 2000, is reported at 210 F.3d 814. The decision of the district court granting in part Merrill Lynch's motion for a temporary restraining order, permanent injunction and other injunctive relief (App. A-28) is not reported.

## JURISDICTION

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit entered its judgment on April 24, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1)(1999) and pursuant to Supreme Court Rule 14. Petitioners were granted an extension of time until August 25, 2000, in which to file their petition for certiorari.

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Missouri Human Rights Act, Mo. Rev. Stat. § 213, et seq., (1994), and the Federal Arbitration Act, 9 U.S.C. § 1 are reproduced in the Appendix, *infra*, App. A-2 — A-13, and App. A-14.

## STATEMENT OF THE CASE –

Petitioners (defendants at the district court) are all persons associated with the Missouri Commission on Human rights ("Commission")[2] and are involved in a case, *State of*

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[2] Jay Nixon is the Attorney General for the State of Missouri and is charged by statute with enforcing the Missouri Human Rights Act. Mo. Rev. Stat. §§ 213.075.7, 213.126 (1994). Keith D. Halcomb is an Assistant Attorney General for the State of Missouri and has been counsel for the Commission in this matter since it was originally set for hearing on July 8, 1997. Gerald P. Greiman was the Chairperson of the Commission who made the decision that this matter warranted a public hearing under Missouri law. *Id.* § 213.075.5. Donna Cavitte is the Executive Director of the Commission. Geraldine Johnson, Sterling Adams, and Nancy Reynolds are all Commissioners, appointed by the

*Missouri ex rel. Anthony Hoskins v. Merrill Lynch,* currently pending before the Missouri Commission on Human Rights. The Missouri Human Rights Act "authorizes the Missouri Commission on Human Rights 'to take such affirmative action [that] will implement the purpose of [the Human Rights Act],' including an award of actual damages." *Van den Berk v. Missouri Comm'n on Human Rights Act,* 2000 WL 1017024, *6 (Mo. App. E.D. 2000), quoting Mo. Rev. Stat. § 213.075.11(1), and citing *Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.,* 991 S.W.2d 161, 171 (Mo. App. W.D. 1999). An award of damages "is justified to promote the remedial purposes of the Missouri Human Rights Act." *Van den Berk,* at *6. The decision of the U.S. Court of Appeals for the Eighth Circuit effectively prevents the Commission from fully enforcing the Missouri Human Rights Act.

Anthony Hoskins, an African-American stock broker, was employed by respondent Merrill, Lynch, Pierce, Fenner & Smith, Inc. As a broker, Hoskins traded stocks on the New York Stock Exchange (NYSE). Hoskins was required to sign a standardized registration form, called the U-4 Form, which was generally required of all employees in the securities industry. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 170 F.3d 1, 4-5 (1st Cir. 1999).[3]

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Governor of Missouri, who participated in the Commission's determination that Merrill Lynch's motion to dismiss filed with the Commission should be denied. *Id.* §§ 213.020.1 and 213.075.14.

[3] Form U-4 originated at the Securities and Exchange Commission (SEC). A copy of the current Form U-4 can be found on the National Association of Securities Dealers (NASD) web site, www.nasdr.com/4700.htm, which shows that a completed, signed Form U-4 is required for NASD

"[S]igning the U-4 Form [is] a prerequisite for employment as a securities broker." *Id.*, at 17. Merrill Lynch admitted in *Rosenberg* that "it would not 'employ or promote financial consultants who refuse to sign the Form U-4.'" *Id.*, at 17 (quotations in the original). Form U-4 includes a clause requiring that Hoskins submit any employment disputes to arbitration. App. A-6; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon, et al.*, 210 F.3d 814, 816 (8th Cir. 2000).

After his termination, Hoskins submitted claims of discrimination to a National Association of Securities Dealers arbitration panel. He claimed that he was terminated because of his race. The panel found Merrill Lynch did not discriminate against him. App. A-16 — A-17.

Hoskins also filed a complaint with the Missouri Commission on Human Rights, asserting that Merrill Lynch had violated the Missouri Human Rights Act. The Commission investigated Hoskins's complaint and, after the arbitration decision, determined that there was probable cause to believe that Hoskins was terminated because of his race. App. A-29. The Commission thus brought charges in accordance with the Missouri Human Rights Act, Mo. Rev. Stat. § 213.075.5.[4] App. A-9, A-17. The Commission cited as authority only the Missouri Act; it did not raise any federal claims against Merrill Lynch. App. A-17.

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membership.

[4] The Commission alleged that Merrill Lynch discriminated based on race against Hoskins and other, unnamed employees in respect to discharge, compensation, terms, conditions, or privileges of employment. The Commission sought relief for Hoskins and other employees who were illegally discriminated against.

Merrill Lynch asked the Commission to dismiss its charges. Merrill Lynch claimed that because the Federal Arbitration Act preempts state anti-discrimination law, the Missouri Human Rights Act's grant of authority to the Commission to proceed on Hoskins' claim violates the Supremacy Clause, U.S. Const. art VI, Cl. 2.[5] The Commission denied Merrill Lynch's motion to dismiss.

Rather than pursue its defenses in a state forum, Merrill Lynch asked the U.S. District Court for the Eastern District of Missouri to enjoin Petitioners from pursuing the state action. Prior to the Commission being able to conduct any meaningful discovery, the district court found the reasoning in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2nd Cir. 1998), persuasive, and ruled that Merrill Lynch's request for injunctive relief should be granted as to damages based on individuals' claims. App. A-33 — A-34, A-38. The court enjoined Petitioners from pursuing monetary damages for Hoskins. App. A-38. The district court's order permitted the Commission to proceed against Merrill Lynch for injunctive relief. *Id.* The district court rejected the Petitioners' argument that a federal court did not have subject matter jurisdiction to hear this matter. App. A-33.

Petitioners appealed to the United States Eighth Circuit Court of Appeals, which affirmed the district court's

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[5] Before the Commission and the district court, Merrill Lynch also asserted collateral estoppel, claiming that the prior arbitration decision barred the Commission from litigating the issue of whether Merrill Lynch discriminated against Hoskins even though the Commission was not a party to the arbitration or the arbitration agreement. Merrill Lynch did not assert such claim preclusion and collateral estoppel arguments at the Eighth Circuit.

decision.[6] The Eighth Circuit held that the Arbitration Act creates a federal right for employers, and that the actions of the Commission interfered with that right. App. A-18. The Eighth Circuit reasoned that "the utility of arbitration would be drastically reduced" if employees were allowed to relitigate arbitration cases. App. A-20. The court held that as monetary remedies are highly individual in nature, when the Commission sought such relief based on Hoskins's claim, it was acting as his representative. App. A-21. The Commission was still permitted to seek injunctive relief. App. A-25.

## REASONS FOR GRANTING THIS WRIT

### I. The Eighth Circuit lacked jurisdiction to decide the significant legal questions presented here.

The Eighth Circuit failed to fully and properly address a critical issue: the subject matter jurisdiction of the federal courts. In that respect, the petition should be granted and the decision summarily reversed.

To bring its claim in federal court, both the Eighth Circuit and Merrill Lynch understood that Merrill Lynch was required to find some "federal question." App. A-18. The Eighth Circuit relied on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for the proposition that "federal courts have jurisdiction to enjoin state officials from interfering with federal rights." 463 U.S. at 96 n. 14. App. A-18. The Eighth Circuit found that Merrill Lynch had an independent,

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[6] The Eighth Circuit did reverse the district in holding that the Commission was entitled to be dismissed from the action based on Eleventh Amendment immunity, leaving only individual state officials as defendants. App. A-23 — A-24.

federal right under the Arbitration Act. *Id.* But reliance on *Shaw* fails where there is no identifiable federal right. That the Arbitration Act does not grant an independent federal right, under the present circumstances, is clear from many decisions of this Court.

This Court has consistently held that the Arbitration Act only guarantees the enforceability of private contracts. The Act's "purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). *See also Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) (same). It was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." *Dean Witter Reynolds*, 470 U.S. at 220. "Having made the bargain to arbitrate, the party should be held to it." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

But the Commission was not a party to the employee's agreement to arbitrate. Even if the employee agreed to binding arbitration, no right under the agreement can be asserted against the Commission. The Commission is not bound thereby. Therefore, no right is secured by the Arbitration Act insofar as the Commission is concerned. Indeed, in *Dean Witter Reynolds* this Court treated the possible preclusive effect of an arbitration decision as a matter separate from the Arbitration Act analysis. 470 U.S. at 223.

Moreover, even in cases involving arbitration participants, this Court has held that the Arbitration Act "does not create any independent federal question jurisdiction." *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,

25 n. 32 (1983). Only when a federal court has jurisdiction of the underlying dispute does the Arbitration Act apply. *Id.* But the federal court had no independent basis for jurisdiction of the underlying dispute in this case. Merrill Lynch could not rely on the underlying civil rights law, as could the employer fighting an action by the EEOC under federal law. Unlike *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 USLW 3726 (U.S. May 15, 2000)(No. 99-1823), the proceeding that Merrill Lynch sought to enjoin was in a state forum. The Commission's complaint was based solely on state law and involved a state agency (not a federal defendant) that had neither waived its Eleventh Amendment immunity nor had such immunity explicitly, validly abrogated.

In *Volt Information Sciences, Inc.*, 489 U.S. at 479, this Court held that an agreement to arbitrate by different rules than contained in the Arbitration Act does not constitute a violation thereof. Since the purpose of the Act is to protect the right to contract, it is not violated by a voluntary contract to follow arbitration rules other than those of the Act itself. The Act is even less applicable when a party such as the Commission has made no agreement to arbitrate.

The effect of an arbitration agreement or an arbitration decision — the only issue Merrill Lynch raised below — is not controlled by the Arbitration Act as it relates to nonparticipants in the agreement or arbitration. Any possible effect, therefore, does not present a federal question and thus cannot be the basis for federal court jurisdiction.

This is true regardless of whether Merrill Lynch, rather than asserting an affirmative federal right, instead poses the Arbitration Act as a federal defense. It is the nature of the state action, not the possible federal defenses, that determines whether there is federal question jurisdiction.

*Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237 (1952). The Eighth Circuit improperly ignored that rule when it concluded that it had jurisdiction to rule on Merrill Lynch's claim of preclusion.

If the arbitration in this case has some binding effect on the Commission, it must be on some basis other than the Arbitration Act. Thus, Merrill Lynch's citation to the Act did not establish federal question jurisdiction and the Eighth Circuit's decision should be summarily reversed.

## II. The Eighth Circuit's opinion deepens the split among the circuits and exacerbates the fractured, confusing analyses the circuits employed.

Obviously the Eighth Circuit's decision conflicts with the decision of the Ninth Circuit in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (1999), *cert. granted*, 120 S.Ct. 2004 (2000)(No. 99-1379),[7] where that court held that the Arbitration Act does not even apply to employment contracts — a holding that would, if upheld, implicitly eliminate the basis for the Eighth Circuit's decision here. But as the

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[7] The Ninth Circuit, in both *Circuit City* cases, has declined to extend the application of the Federal Arbitration Act to employment contracts. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999), *cert. granted*, 120 S.Ct. 2004 (2000) (No. 99-1379); *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131, 1133 (9th Cir. 1999), *petition for cert. filed*, 68 USLW 3536 (U.S. Feb. 16, 2000) (No. 99-1378). The Eighth Circuit here joins the Fourth and other circuits holding to the contrary. *See EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 USLW 3726 (U.S. May 15, 2000) (No. 99-1823).

petition for writ of certiorari in the *Circuit City* case pointed out, the Ninth Circuit's decision conflicts with decisions in numerous circuits. The decision of the Eighth Circuit to join the majority side in that conflict might merit a grant and remand for consideration in light of *Circuit City*, but it would not merit separate consideration of this case. What merits consideration by this Court is the Eighth Circuit's distinctive entry into the morass of conflicting views as to how the Arbitration Act, once applied to employment contracts, affects the ability of government agencies to enforce the laws attacking employment discrimination.

In another case in which a petition for writ of certiorari is pending, the Fourth Circuit, in a decision at odds with the Sixth and Ninth Circuits, held that a private agreement to arbitrate prevented the EEOC from seeking any individual relief, monetary or injunctive. ***EEOC v. Waffle House, Inc.***, 193 F.3d at 812. The Fourth Circuit concluded that the EEOC must bow to an employee's prior agreement to arbitrate, even if the EEOC was not a party to the agreement. *Id.* at 813. The Eighth Circuit's decision here generally follows the Fourth Circuit's decision in ***Waffle House***, thus providing further evidence of the conflict identified by the EEOC in its petition for writ of certiorari in that case.

But in addition to the jurisdictional question discussed above, the issues raised by the Eighth Circuit's decision go beyond those raised in ***Waffle House*** in at least three respects that militate in favor of granting the petition here, regardless of the Court's action in that case. First, the employee here was not just subject to an arbitration agreement; he had completed (and failed in) arbitration. Second, the claim was asserted under state, not under federal law, by a state, and not by a federal agency. And third, the claim arose with regard to a class of employees, found in every state, who are literally

*required* to sign an arbitration agreement to remain in their chosen profession.

In the narrower *Waffle House* case, the Fourth Circuit held that "[w]hen the EEOC seeks 'make whole' relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed." *Id.* at 812. The EEOC would not be allowed to proceed with its case unless it sought class wide equitable relief, an issue the Fourth Circuit left the district court to decide. *Id.* at 813, n. 3. The Eighth Circuit applied a comparable rule here to a state agency with a role similar to that of the EEOC.

The Second Circuit has taken a course similar to that of the Fourth, holding that a private agreement to arbitrate barred the EEOC from seeking monetary damages based on individual claims. *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 300-01 (2nd Cir. 1998). The Second Circuit based its decision on the "liberal federal policy favoring arbitration agreements." *Id.* at 302, citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).[8]

But the Sixth Circuit took a fundamentally different approach. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 466 (6th Cir. 1999). The Sixth Circuit held that the Arbitration Act does not prohibit the EEOC from pursuing both monetary and injunctive relief on behalf of aggrieved individuals. *Id.* In the Sixth Circuit case, all applicants had to sign a pre-employment agreement requiring arbitration of any employment disputes. *Id.*, at 452. An employee, alleging she was denied a promotion based on her

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[8] As the employer in *Kidder* had ceased operations, the EEOC stipulated to the district court that it no longer was seeking injunctive relief. *Kidder*, 156 F.3d at 300.

race, filed a complaint against Frank's Nursery with the EEOC.[9] *Id.*, at 453. After investigating the claim, the EEOC filed suit in federal court alleging that Frank's Nursery discriminated based on race. *Id.* In its suit, the EEOC sought both injunctive and monetary relief. *Id.*

The Sixth Circuit, applying "general principles of contract law," held that the complaining employee could not waive the statutory right of a governmental entity. *Id.*, at 459. Because the EEOC never agreed to arbitrate, it was not bound by the provisions of the arbitration agreement entered into by the employee. *Id.* The EEOC was thus allowed to seek both individual monetary and injunctive damages. In effect, the Sixth Circuit held that governmental agencies cannot be bound by individual decisions to arbitrate. The Sixth Circuit thus recognized for civil rights agencies an independent role — even as to *post hoc* relief — that the Fourth and Eighth Circuits denied.

Including the Ninth Circuit's decision on the preliminary question, five circuits have at least indirectly addressed the issue of whether the Arbitration Act prevents governmental entities from pursuing civil rights remedies, and four have issued different and wide ranging decisions pertaining specifically to the ability of civil rights agencies to pursue remedies despite private arbitration. Thus, today the EEOC and state civil rights agencies are empowered in the Sixth and Ninth Circuits, and rendered impotent in the Second, Fourth, and Eighth. In two circuits, the agencies have independent enforcement authority that permits them to prevent employers from taking advantage of the arbitration system to reduce the price they must pay for civil rights violations; in three others, the agencies can say nothing more

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[9] The employee never submitted her claims to arbitration.

than, "Don't do it again." That conflict, which only this Court can eliminate, creates confusion, chaos, and inequity.

The confusion, chaos, and inequity will grow as the use of arbitration agreements grows. In fact, employers are increasingly using arbitration agreements as a pre-condition to employment. *See Rosenberg v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 995 F. Supp. 190, 199 n. 12 (D. Mass. 1998)(citing studies showing increase in pre-dispute employment arbitration agreements), *aff'd*, 170 F.3d 1 (1st Cir. 1999). If the decisions of the Second, Fourth, and Eighth Circuits remain undisturbed, other employers will see arbitration agreements as a way of substantially eliminating the possibility of civil rights enforcement by the government. It is easy to imagine situations outside the employment arena where arbitration agreements might be used. Real estate agents or leasing agents might start having clients or potential tenants sign arbitration agreements, whereby any claims of discrimination in housing will have to be submitted to binding arbitration. Hotels, airlines, and travel agents, as well as other public accommodations, could soon follow such a lead, requiring arbitration agreements in their own form contracts.

Thus it might not be much longer before the EEOC, the Commission, and, for example, the U.S. Department of Housing and Urban Development have their oversight of the employment, public accommodation, and housing fields severely restricted as arbitration agreements become more and more prevalent. Such a court-imposed restriction on civil rights agencies' powers would thwart the intent of Congress and the Missouri legislature that these agencies work to eradicate discrimination in the United States and Missouri.

## III. This case presents important issues that merit review regardless of this Court's disposition of *Circuit City* and *Waffle House*.

*Circuit City* raises the critical and basic issue of the application of the Arbitration Act to employment contracts. If the Ninth Circuit is affirmed, that case may well preempt the issues presented here and in *Waffle House*. But if it is reversed, the conflicts identified in these government enforcement cases will persist. If the Court grants the EEOC's petition and decides *Waffle House*, it will necessarily resolve some aspects of the conflict among the Second, Fourth, Sixth, and Eighth Circuits. Hearing this case, the Court could fill in detail that the narrower *Waffle House* case would not permit. In addition to the jurisdictional issue discussed above, this case goes beyond *Waffle House* in three significant respects:

1. The *Waffle House* employee was subject to an arbitration agreement, but did not pursue arbitration as that agreement required. Here, by contrast, the employee pursued the only option the agreement gave him. So *Waffle House* addresses the scope of the agency's authority when an employee *could have* pursued arbitration; this case addresses the scope of the agency's authority when the employee *actually pursued* arbitration. Were this Court to grant the petition in *Waffle House* and reverse, employers such as Merrill Lynch would argue that the decision is limited to instances where the employee elected not to arbitrate, and that agencies still cannot pursue relief when the employee complied with the contractual agreement to arbitrate.

The distinction should not amount to a dispositive defense for employers in government agency civil rights enforcement proceedings. It is the employers who insist on the contractual arrangement to arbitrate as a condition of

employment. And not only is a government agency not a party to such a private contract, an agency's civil rights enforcement efforts are not served by, nor should they be conditioned on, requiring an individual employee to ignore a contractual agreement with his or her employer.

2. This case also raises issues of sovereignty. *Waffle House* arose from an enforcement action by the EEOC of the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991. 193 F.3d 805, 807. But this case arose from enforcement action by a state agency under state law: The Missouri Commission on Human Rights found probable cause that Merrill Lynch terminated Hoskins because of his race, and determined that it would bring a state action against Merrill Lynch for violation of the Missouri Human Rights Act. Mo. Rev. Stat. § 213, et seq.

While the Commission brought the state action against Merrill Lynch based on Hoskins' complaint of discrimination, the Commission is not merely a surrogate for individual victims of discrimination. The Commission is empowered "to eliminate and prevent discrimination because of race." Mo. Rev. Stat. § 213.030(1). This case, unlike *Waffle House*, raises issues of state authority and sovereignty not present in *Waffle House* or *Circuit City*. The Commission represents the interests of the state, something a private individual cannot do. *Waffle House*, 193 F.3d at 810. The Commission (in this respect, again, like the EEOC) never ceases to represent the state's interests even while proceeding on an individual's complaint of discrimination.[10] *See Frank's*

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[10] The Missouri Human Rights Act is explicitly made part of the enforcement scheme of Title VII, and therefore, the Commission acts on the state level in a capacity similar to that of the EEOC. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997).

*Nursery*, 177 F.3d at 458; *van den Berk*, 2000 WL 1017024, at *6. Thus this case is an attack not just on the availability of relief for Hoskins, but on the authority of the states.

Limiting the ability of the Commission and similar agencies in other states to pursue monetary relief would negatively impact the ability of those states to protect their citizens against unlawful discrimination. *Id.*, at 466. "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper v. Moody*, 422 U.S. 405, 417 (1975). It is the prospect of having to pay back wages that in many cases "'provides the spur or catalyst'" for change in discriminatory employment practices. *Id.*, *quoting U.S. v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973) (also describing back pay awards as playing "a crucial role in the remedial process"). The Missouri legislature recognized that a potential award of back pay is an important facet of its overall plan to eradicate racial discrimination in Missouri, and gave the Commission the authority to award such damages. Mo. Rev. Stat. § 213.075.11(1).

As part of the sovereignty question, this case adds an Eleventh Amendment immunity issue to those presented in *Circuit City* and *Waffle House*. The State of Missouri has not waived its Eleventh Amendment immunity from suit in federal court in cases where parties wish to enjoin Missouri's agencies and officials from pursuing enforcement of the state's civil rights laws. No party in *Circuit City* or *Waffle House* can raise Eleventh Amendment immunity from suit in such cases, as the Commission did below.

Not only has Missouri not waived its immunity, Congress made no effort in 1925 to abrogate the States' immunity when it passed the Arbitration Act. The lack of waiver is all the more stark in the context of this case,

brought against the Commission and state officials in federal court by virtue of an Arbitration Act defense, because the Arbitration Act is not a jurisdictional statute. It

> is something of an anomaly in the field of federal-court jurisdiction. It creates a federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction .... Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other basis for federal jurisdiction.

*Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). Not only is there no Eleventh Amendment waiver whatsoever — whether by Missouri itself or by Congress — the Commission and Missouri officials have been haled into federal court by a statute that this Court declared some 17 years ago does not even create federal question jurisdiction.

3. Finally, this case is based on an arbitration agreement that is not unique to one employer, but that covers an entire profession. Though the employee in *Waffle House* was required to sign an arbitration agreement in order to work for one employer, presumably he could have found similar work elsewhere, and thus could have either gone to an employer who did not require arbitration, or negotiated to eliminate the arbitration clause from the agreement with Waffle House. But Hoskins, faced with an industry-wide broker arbitration requirement, had no such choice. *See* note 2 and accompanying text, *infra*; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Perhaps in response to a future reversal of *Waffle House*, an employer would argue that the employee had a choice, and that choice somehow affected the agency's ability to proceed. But if the Eighth Circuit is right, then the Missouri Commission on Human Rights and the EEOC have no ability to address even pervasive discrimination against brokers — except, again, through "Don't do it again" injunctions.

## IV. The decision below is inconsistent with decisions of this Court.

The decision of the Eighth Circuit barring the Commission from seeking relief based on an arbitration proceeding to which it was not and could not be a party is contrary not just to decisions in other circuits, but to decisions of this Court.

1. The conflict is apparent, first, when the Eighth Circuit's holding is compared to cases in which employees, after arbitration, themselves asserted statutory claims. Most notable is *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), where this Court held that an individual was entitled to a trial de novo of his Title VII claim despite an adverse arbitral decision. Thus the Court rejected a premise implicit in the Eighth Circuit's holding: that the mere fact that arbitration has taken place by itself bars subsequent litigation.

Title VII allows parallel or overlapping remedies for employment discrimination. The "submission of a claim in one forum does not preclude a later submission to another." 415 U.S. at 47-48. These other forums can include independent pursuit of rights under other applicable state statues. 415 U.S. at 48. In the instant case, the Commission is protecting rights and pursuing remedies afforded by such a state statute.

Apart from Congress' intent in enacting Title VII, this Court's conclusion was based on the separate nature of the rights asserted in the arbitration and judicial proceeding. The arbitration in *Gardner-Denver* asserted a violation of the nondiscrimination clause of a collective bargaining agreement. But the lawsuit asserted independent statutory rights under Title VII. This Court found no inconsistency in allowing each to be asserted in the appropriate forum because "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." 415 U.S. at 50.

Similarly, the rights asserted in this case are distinctly separate, albeit for a somewhat different reason. In *Gardner-Denver,* the same party asserted different claims. But here, different parties assert different claims. An employee's personal interest in being free from discrimination is distinct from the public's interest, as represented by the Commission, that employment in the State of Missouri is free from discrimination. Although both are based upon a prohibition of racial discrimination in employment, they "have legally independent origins." 415 U.S. at 52. Even if violated by the same factual occurrence, each claim should be equally available to the appropriate party and determined in its respective forum.

Thus, the rationale of this Court's decision in *Gardner-Denver* leads to the conclusion that the Eighth Circuit's decision was erroneous. But the decision below is also inconsistent with this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). There this Court held that an employee who had entered into an arbitration agreement could be required to assert his Age Discrimination in Employment Act (ADEA) claim through arbitration, rather than federal court. This Court rejected an argument that arbitration would undermine the role of the

EEOC, because "[a]n individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." 500 U.S. at 28. The analysis implies that the EEOC can pursue a charge however it sees fit, seeking whatever remedies are statutorily available to it. Likewise, an employee subject to an arbitration agreement may file a charge with the Commission, and the Commission may exercise its statutory authority. The right to file a charge would be hollow if agencies such as the EEOC and the Commission could do nothing for the claimant if the arbitration was unsuccessful.

This Court has refused to give preclusive effect to arbitration decisions in other contexts. For example, prior arbitration does not bar a suit pursuant to 42 U.S.C. § 1983. *McDonald v. City of West Branch, Michigan,* 466 U.S. 284 (1984). Unsuccessful arbitration does not bar a subsequent suit alleging a violation of the minimum wage provisions of the Fair Labor Standards Act. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). Indeed, this Court has indicated that "the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest." *Dean Witter Reynolds*, 470 U.S. at 222. By giving the arbitration a preclusive effect in the instant case, the court of appeals settled the question in a fashion contrary to these decisions of this Court.

Again, if agreements to arbitrate, or actual arbitration, bar agencies such as the Commission and EEOC from exercising their statutory authority to seek individual relief, then the public's power to remedy discrimination has been significantly curtailed. By insisting on such agreements, the very groups from whom protection was guaranteed can severely limit public oversight. Nor would that limit on oversight be limited to employment. Hotel chains could

avoid review by including an agreement to arbitrate in every registration form. Every lease could include an agreement to arbitrate. To maintain the public's authority, this Court should grant the petition, reverse the decision of the Eighth Circuit, and reaffirm that public agencies such as the Commission and EEOC are not the proxies of individual victims but are instead free to protect the public's interest in preventing employment discrimination.[11]

2. The Court of Appeals ignored a second set of cases when it held that the Commission, though itself never a party or privy to arbitration, was a representative of the employee, insofar as individual relief is sought, and so bound by the arbitral decision. The decisions of this Court do not support the notion that a public agency such as the Commission represents private interests even when it seeks relief for an individual victim of discrimination.

In this regard, the most notable precedent is *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980). There this Court held that EEOC claims for individual back pay were not representative actions under Rule 23 of the Federal Rules of Civil Procedure. The fact th individual victims could sue in their own right "suggest[ed] that EEOC is not merely a proxy for the victims of discrimination." 446 U.S. at 326. Rather, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific

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[11] Of course, as a federal agency, EEOC's authority could be so limited by Congress. But even had Congress intended to limit state agencies such as the Commission, its power to do so under the Commerce Clause would be questionable. *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

individuals, it acts also to vindicate the public interest in preventing employment discrimination." 446 U.S. at 326.

Like the EEOC, the Commission is a public body furthering a strong public interest. It is charged with eliminating and preventing discrimination because of "race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing." Mo. Rev. Stat. §213.030.1(1). An individual victim of discrimination is not authorized to waive the authority of the Commission. Neither is he authorized to represent the interests of the Commission. As a result, neither an agreement to arbitrate a dispute, nor the actual arbitration itself, should divest the Commission of its statutory powers and duties.

A concern leading to this Court's conclusion in *Gardner-Denver* was the union's control over the presentation of the grievance under the collective bargaining agreement. The interests of the union and the employee may not always be harmonious. 415 U.S. at 58 n. 19. Similarly, in the instant case, the employee has exclusive control over the presentation of his claim during arbitration. But in a hearing under Missouri law, the Commission is required to be a party and is represented by either the Attorney General or a Commission staff attorney. Mo. Rev. Stat. § 213.075.7. Although the interests of an aggrieved employee and the Commission may be parallel, the public's interest in preventing and remedying racial discrimination should not be thwarted by an individual employee's litigation which the Commission cannot control, nor even influence.

## CONCLUSION

For the reasons stated above, the Court should grant the petition for writ of *certiorari*, and either summarily reverse the court of appeals' holding that it had subject matter jurisdiction, or set this matter for briefing and argument, instead of or alongside *Waffle House*.

Respectfully submitted,

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1. Relevant provisions of the Missouri Human Rights Act, Mo.Rev.Stat., Chapter 213:

**213.030 Powers and duties of commission -- rulemaking, procedure, review. --** 1. The powers and duties of the commission shall be:

(1) To seek to eliminate and prevent discrimination because of race, color, religion, national origin, ancestry, sex, age as it relates to employment, handicap, or familial status as it relates to housing and to take other actions against discrimination because of race, color, religion, national origin, ancestry, sex, age, handicap, or familial status as provided by law; and the commission is hereby given general jurisdiction and power for such purposes;

(2) To implement the purposes of this chapter first by conference, conciliation and persuasion so that persons may be guaranteed their civil rights and goodwill be fostered;

(3) To formulate policies to implement the purposes of this chapter and to make recommendations to agencies and officers of the state and political subdivisions in aid of such policies and purposes;

(4) To appoint such employees as it may deem necessary, fix their compensation within the appropriations provided and in accordance with the wage structure established for other state agencies, and prescribe their duties;

(5) To obtain upon request and utilize the services of all governmental departments and agencies to be paid from appropriations to this commission;

(6) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter and the policies and practices of the commission in connection therewith;

(7) To receive, investigate, initiate, and pass upon complaints alleging discrimination in employment, housing or in places of public accommodations because of race, color, religion, national origin, ancestry, sex, age as it relates to

employment, handicap, or familial status as it relates to housing and to require the production for examination of any books, papers, records, or other materials relating to any matter under investigation;

(8) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, to take the testimony of any person under oath, and, in connection therewith, to require the production for examination of any books, papers or other materials relating to any matter under investigation or in question before the commission;

(9) To issue publications and the results of studies and research which will tend to promote goodwill and minimize or eliminate discrimination in housing, employment or in places of public accommodation because of race, color, religion, national origin, ancestry, sex, age as it relates to employment, handicap, or familial status as it relates to housing;

(10) To provide each year to the governor and to the general assembly a full written report of all its activities and of its recommendations;

(11) To adopt an official seal;

(12) To cooperate, act jointly, enter into cooperative or work sharing agreements with the United States Equal Employment Opportunity Commission, the United States Department of Housing and Urban Development, and other federal agencies and local commissions or agencies to achieve the purposes of this chapter;

(13) To accept grants, private gifts, bequests, and establish funds to dispose of such moneys so long as the conditions of the grant, gift, or bequest are not inconsistent with the purposes of this chapter and are used to achieve the purposes of this chapter;

(14) To establish a human rights fund as defined in section 213.010, for the purposes of administering sections 213.040, 213.045, 213.050, 213.070, 213.075, and 213.076.

2. No rule or portion of a rule promulgated under

the authority of this chapter shall become effective until it has been approved by the joint committee on administrative rules in accordance with the procedures provided herein, and the delegation of the legislative authority to enact law by the adoption of such rules is dependent upon the power of the joint committee on administrative rules to review and suspend rules pending ratification by the senate and the house of representatives as provided herein.

3. Upon filing any proposed rule with the secretary of state, the filing agency shall concurrently submit such proposed rule to the committee, which may hold hearings upon any proposed rule or portion thereof at any time.

4. A final order of rulemaking shall not be filed with the secretary of state until thirty days after such final order of rulemaking has been received by the committee. The committee may hold one or more hearings upon such final order of rulemaking during the thirty-day period. If the committee does not disapprove such order of rulemaking with the thirty-day period, the filing agency may file such order of rulemaking with the secretary of state and the order of rulemaking shall be deemed approved.

5. The committee may, by majority vote of the members, suspend the order of rulemaking or portion thereof by action taken prior to the filing of the final order of rulemaking only for one or more of the following grounds:

(1) An absence of statutory authority for the proposed rule;

(2) An emergency relating to public health, safety or welfare;

(3) The proposed rule is in conflict with state law;

(4) A substantial change in circumstance since enactment of the law upon which the proposed rule is based.

6. If the committee disapproves any rule or portion thereof, the filing agency shall not file such disapproved portion of any rule with the secretary of state and

the secretary of state shall not publish in the Missouri Register any final order of rulemaking containing the disapproved portion.

7. If the committee disapproves any rule or portion thereof, the committee shall report its findings to the senate and the house of representatives. No rule or portion thereof disapproved by the committee shall take effect so long as the senate and the house of representatives ratify the act of the joint committee by resolution adopted in each house within thirty legislative days after such rule or portion thereof has been disapproved by the joint committee.

8. Upon adoption of a rule as provided herein, any such rule or portion thereof my be suspended or revoked by the general assembly either by bill or, pursuant to section 8, article IV of the constitution, by concurrent resolution upon recommendation of the joint committee on administrative rules. The committee shall be authorized to hold hearings and make recommendations pursuant to the provisions of section 536.037, RSMo. The secretary of state shall publish in the Missouri Register, as soon as practicable, notice of the suspension or revocation.

**213.055. Unlawful employment practices.** - 1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or handicap of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

(b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

(2) For a labor organization to exclude or to expel from its membership any individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer because of race, color, religion, national origin, sex, ancestry, age or handicap of any individual; or to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap; or for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs to discriminate against any individual because of his race, color, religion, national origin, sex, ancestry, age or handicap in admission to, or employment in, any program established to provide apprenticeship or other training;

(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, color, religion, national origin, sex, ancestry, age or handicap unless based upon a bona fide occupational qualification or for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, national origin, sex, ancestry, age as it relates to employment or handicap, or to classify or refer for

employment any individual on the basis of his race, color, religion, national origin, sex, ancestry, age or handicap.

2. Notwithstanding any other provision of this chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences or such systems are not the result of an intention or a design to discriminate, and are not used to discriminate, because of race, color, religion, sex, national origin, ancestry, age or handicap, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test, provided that such test, its administration, or action upon the results thereof, is not designed, intended or used to discriminate because of race, color, religion, national origin, sex, ancestry, age or handicap.

3. Nothing contained in this chapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to his chapter to grant preferential treatment to any individual or to any group because of the race, color, religion, national origin, sex, ancestry, age or handicap of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, national origin, sex, ancestry, age or handicap employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, national origin, sex, ancestry, age or handicap in any community, state, section, or other area, or in the available

work force in any community, state, section, or other area.

**213.075 Complaints to commissions, how filed, when -- filing with federal agencies, effect -- duties of executive director -- respondents -- hearing, notice, procedure -- attorney general to represent commission -- appeal, discovery -- effect of orders of commission. --** 1. Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the commission a verified complaint in writing, within one hundred eighty days of the alleged act of discrimination, which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice and which shall set forth the particulars thereof and such other information as may be required by the commission. The complainant's agent, attorney or the attorney general may, in like manner, make, sign and file such complaint.

2. Any complaint which is filed with the federal Equal Employment Opportunity Commission or other federal agencies with which the commission has a work-sharing or deferral agreement, or with a local commission which has been certified as substantially equivalent by the commission, shall be deemed filed with the commission on the date that such complaint is received by such federal agency or local commission. A copy of all complaints filed with a local commission with the authority to enforce the provisions of this chapter is to be forwarded to the commission within seven days of the filing thereof with such local commission. If a local commission has jurisdiction to hear a complaint filed with the commission, such complaint shall be deemed to have been filed with the local commission on the date on which such complaint was filed with the commission. The commission shall, within seven days of the receipt of a complaint which a local commission has jurisdiction to hear, forward a copy thereof to such local commission.

3. After the filing of any complaint, the executive director shall, with the assistance of the commission's staff, promptly investigate the complaint, and if the director determines after the investigation that probable cause exists for crediting the allegations of the complaint, the executive director shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion, and shall report the results to the commission. The investigation, determination of probable cause and conciliation shall be conducted according to such rules, regulations and guidelines as the commission shall prescribe.

4. A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, pursuant to such rules, regulations, and guidelines as the commission shall prescribe. Such notice, in addition to complying with the requirements of such rules, regulations, and guidelines, shall also state the reason why the person to whom the notice is addressed has been joined as a party.

5. In case of failure to eliminate such discriminatory practice as found in the investigation, if in the judgment of the chairperson of the commission circumstances so warrant, there shall be issued and served in the name of the commission, a written notice, together with a copy of the complaint, as it may have been amended, requiring the person named in the complaint, hereinafter referred to as "respondent", to answer the charges of the complaint at a hearing, at a time and place to be specified in the notice, before a panel of at least three members of the commission sitting as the commission or before a hearing examiner licensed to practice law in this state who shall be appointed by the executive director an approved by the commission. The place of the hearing shall be in the office of the commission or such other place designated by it, except that

if the respondent so requests, in writing, the hearing shall be held in the county of such person's residence or business location at the time of the alleged unlawful discriminatory practice. A copy of the notice shall also be served on the complainants.

6. In all cases where a written notice of hearing has been issued and a party has not elected the option to proceed in circuit court as set forth in section 213.076, the procedures set forth for a hearing shall apply.

7. The commission shall be a party to the action and shall be represented before the panel or the hearing examiner by the office of the attorney general or, when so delegated by the attorney general, a staff attorney of the commission. Neither the hearing examiner nor any member of the panel shall have participated in the investigation of the complaint. Evidence concerning endeavors at conciliation shall be excluded.

8. The respondent may file a written verified answer to the complaint and appear at the hearing in person or otherwise with or without counsel, and submit testimony. At the discretion of the hearing examiner or the panel, the complainant may be allowed to intervene, thereby becoming a party to the action with the right to present testimony in person or by counsel, provided the complainant at all times shall be treated as a party for the purpose of discovery and the taking of depositions. The commission or complainant intervenor shall have the power to reasonably and fairly amend any complaint, and the respondent shall have like power to amend any answer. The testimony taken at the hearing shall be under oath and be transcribed.

9. In any contested case before the commission, any party may take and use written interrogatories, requests for production of documents and other materials, and requests for admissions, and all other forms of discovery authorized by rules of civil procedure in the same manner, upon, and under the same conditions, and upon the same notice, as is or may

hereafter be provided for with respect to the taking and using of written interrogatories, requests for production of documents and other materials, and requests for admissions, and all other forms of discovery authorized by rules of civil procedure in civil actions in the circuit court. The panel or hearing examiner shall have the authority to impose sanctions in the same manner as set forth in the rules of civil procedure.

10. The hearing shall be conducted in the manner provided by chapter 536, RSMo.

11. When the case is heard by a panel of the commission, the chairperson of the commission shall select the hearing panel and the presiding officer. The presiding officer shall have full authority to call and examine witnesses, admit or exclude evidence and rule upon all motions and objections. The panel shall state its findings of fact and conclusions of law, and if, upon all the evidence at the hearing, the panel finds:

(1) That a respondent has engaged in an unlawful discriminatory practice as defined in this chapter, the commission shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to, payment of backpay; hiring; reinstatement or upgrading; restoration to membership in any respondent labor organization; the extension of full, equal and unsegregated housing; the extension of full, equal and unsegregated public accommodations; extension of a commercial real estate loan or other financial assistance; extension or restoration of membership or participation in any multiple listing service or other real estate service organization or facility; payment of actual damages; and the submission of a report of the manner of compliance;

(2) That a respondent has engaged or is about to engage in a violation of section 213.040, 213.045, 213.050, or 213.070, to the extent that the alleged violation of section 213.070 relates to or involves a violation of one or more of such other sections or relates to or involves the encouraging, aiding, or abetting of a violation of such other sections, the commission may, in addition to the relief provided in subdivision (1) of this subsection*, assess a civil penalty against the respondent, for purposes of vindicating the public interest:

(a) In an amount not exceeding two thousand dollars if the respondent has not been adjudged to have violated one or more of the sections enumerated in subdivision (2) of this subsection within five years of the date of the filing of the complaint;

(b) In an amount not exceeding five thousand dollars if the respondent has been adjudged to have committed one violation of the sections enumerated in subdivision (2) of this subsection within five years of the date on which the complaint is filed;

(c) In an amount not exceeding ten thousand dollars if the respondent has been adjudged to have committed two or more prior violations of the sections enumerated in subdivision (2) of this subsection within seven years of the date on which the complaint is filed. All civil penalties set forth in this subsection shall be paid to the human rights fund.

12. If, upon all the evidence, the panel finds that a respondent has not engaged in any unlawful discriminatory practice, the panel shall state its findings of fact and conclusions of law and shall issue and cause to be served on the complainant and respondent an order dismissing the complaint.

13. When the case is heard by a hearing examiner, the examiner shall have all powers described in subdivision (8) of section 213.030 and subsection 11 of this section, for

the purpose of the hearing. The hearing examiner shall make findings of fact and conclusions of law and shall recommend to the commission an order granting such relief as provided in subsection 11 of this section or dismissing the complaint as to the respondent as provided in subsection 12 of this section, in accordance with such findings.

14. A panel of at least three members of the commission, sitting as the commission, shall review the record, findings and recommended order of the hearing examiner. The panel shall thereafter accept or amend the recommended order which shall become the order of the commission. All orders shall be served on the complainant and respondent, and copies shall be delivered to the attorney general and such other public officers as the commission deems proper.

15. No order of the commission issued pursuant to this section shall affect any contract, sale, encumbrance or lease consummated before the issuance of such order and involving a bona find purchaser without actual notice of the charge filed pursuant to this section.

16. Any person aggrieved by an order of the commission may appeal as provided in chapter 536, RSMo.

*Word "section" appears in original rolls.

2. Title 9 of the United States Code provides:

**§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title**

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

**§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

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No. 99-2635

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| Merrill Lynch, Pierce, Fenner and Smith, Inc., a Delaware Corporation, | * | |
| Appellee, | * | |
| v. | * | Appeal from the United States District Court for the Western District of Missouri |
| Jeremiah W. Nixon, Attorney General, State of Missouri; Keith D. Halcomb, Assistant Attorney General, State of Missouri; Missouri Commission on Human Rights; Gerald P. Gretman, Chairperson, Missouri Commission on Human Rights; Donna Cavitts, Executive Director, Missouri Commission on Human Rights Geraldine Johnson, Commissioner; Sterling Adams, Commissioner, and Nancy Reynolds, Presiding Commissioner, | * | |
| Appellants. | * | |

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Submitted: February 18, 2000

Filed: April 24, 2000

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Before WOLLMAN, Chief Judge, and BOWMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

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MORRIS SHEPPARD ARNOLD, Circuit Judge

When Merrill Lynch, Pierce, Fenner and Smith, Inc. (Merrill Lynch), filed a complaint seeking an order enjoining the Missouri Commission on Human Rights and certain state officers (collectively in this opinion, MCHR, unless otherwise noted) from proceeding in an administrative action with discrimination claims against Merrill lynch, the district court issued an order limiting the forms of relief that the MCHR could seek from Merrill Lynch in the administrative action. The MCHR appeals from this order and we affirm in part and vacate in part.

I.

When Anthony Hoskins was terminated from his employment as a stockbroker with Merrill Lynch, he submitted several claims to arbitration, asserting among other things that his termination violated Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e through §2000e-17, and the Missouri Human Rights Act, *see* Mo. Rev. Stat. §§213.010-213.137. The submission of his claims to arbitration was pursuant to an employment contract known as a "Form U-4," which Mr. Hoskins signed at the commencement of his employment with Merrill Lynch, and that provides that the employee must submit certain employment-related disputes to arbitration. The arbitrator

ultimately found against Mr. Hoskins and dismissed his claims with prejudice.

While Mr. Hoskins's dispute was pending in arbitration, he filed an administrative complaint with the MCHR. Some time after the arbitrator found against Mr. Hoskins, the MCHR initiated an administrative action against Merrill Lynch, contending that Merrill Lynch had violated rights guaranteed to Mr. Hoskins under Missouri law. Merrill Lynch then filed this complaint in federal court, seeking to enjoin the MCHR from proceeding with its administrative action. Merrill Lynch argued that, in light of the arbitrator's decision to dismiss Mr. Hoskins's claims with prejudice, the Federal Arbitration Act, *see* 9 U.S.C. §§ 1-16, precluded the MCHR from bringing its administrative action against Merrill Lynch. The district court enjoined the MCHR from seeking monetary relief on behalf of Mr. Hoskins in its administrative action but refused to enjoin it from seeking injunctive relief on his behalf in that action.

II.

The MCHR first argues that the district court incorrectly found that Merrill Lynch's complaint presented a federal question. The MCHR points out that its administrative action against Merrill Lynch is based only on state law, and argues that under the well-pleaded complaint rule federal-question jurisdiction exists only if "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The MCHR contends that since the Federal Arbitration Act provides Merrill Lynch with, at most, a federal defense to state-law claims, no basis exists for federal-

question jurisdiction. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14, 18-19 (1983).

The MCHR's argument is off the mark, however, because "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). It seems to us that the key questions are whether the federal arbitration statutes create some federal right for Merrill Lynch, and whether the actions of the MCHR in this case would interfere with that right. We believe that the answer to both questions is yes. The statutes specifically provide that arbitration agreements will be "enforceable," *see* 9 U.S.C. § 2, and, for reasons that we discuss in greater detail in the next sections, we think that the efforts of the MCHR to proceed with its administrative claims would interfere with this right. Given the language in *Shaw*, 463 U.S. at 96 n.14, therefore, we hold that Merrill Lynch's complaint properly presents a federal question and that the district court had subject-matter jurisdiction to hear it. *See also Fleet Bank, National Association v. Burke*, 160 F.3d 883, 887-88 (2nd Cir. 1998), *cert. denied*, 119 S. Ct. 2340 (1999).

The MCHR advances three arguments in support of its contention that the arbitrator's ruling against Mr. Hoskins does not bar the MCHR from proceeding with its administrative action against Merrill Lynch. The MCHR argues, first, that an arbitration clause cannot preclude Mr. Hoskins from asserting his statutory rights, and therefore could not preclude the MCHR from asserting Mr. Hoskins's statutory rights on his behalf. Second, the MCHR maintains

that even if Mr. Hoskins himself is precluded from asserting his statutory rights, the MCHR is not. Finally, the MCHR asserts that even if an arbitration clause could bar both Mr. Hoskins and the MCHR from asserting Mr. Hoskins's statutory rights, the arbitration clause in this case does not do so. We address each of these arguments in turn.

III.

The MCHR argues that even if an employee is required to arbitrate claims under an arbitration agreement, that does not preclude the employee from later raising the same claims in court. We disagree. We have specifically held that an arbitrator's award constitutes a final judgment for the purposes of collateral estoppel and *res judicata*. *See Val-U Construction Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581-82 (8th Cir. 1998). In this case, Mr. Hoskins had a full and fair opportunity to litigate his statutory claims in an arbitral forum, he did so, and he lost. Under both federal and Missouri law, the principles of *res judicata* and collateral estoppel bar Mr. Hoskins from subsequently relitigating these same claims, *see id.* at 582 and *Hoelscher v. Patton*, 842 S.W.2d 127, 128 (Mo. Ct. App. 1992).

The MCHR also suggests that even if the arbitrator's decision would ordinarily have a preclusive effect, it does not when a statutory right, and in particular a right under Title VII, is the subject of the arbitration. The MCHR directs our attention to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 43, 49 (1974), in which a plaintiff who lost an arbitration hearing subsequently filed a complaint under Title VII. The *Alexander* Court denied any preclusive effect to the arbitrator's decision on the ground that the arbitrator was

ruling only on the plaintiff's "contractual rights" under a collective bargaining agreement, *id.* at 53-54, and not on the plaintiff's "statutory right[s]" under Title VII, *id.* 52-53, 56. In our case, however, Mr. Hoskins's statutory rights were submitted to arbitration, and there is nothing in *Alexander* that would indicate that the arbitrator's decision should not be given its normal preclusive effect.

The language of § 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991), confirms our view of the matter, for it says that, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII]." We are aware that the House Judiciary Committee notes relevant to § 118 state that the committee did not intend for "the inclusion of [§ 118] . . . to preclude rights and remedies that would otherwise be available [under Title VII]." H.R. Rep. No. 102-40(II), at 80 (1991). This statement, however, is ambiguous, for it might simply mean that the House of Representatives did not intend to make arbitration the sole means of vindicating the rights created by Title VII.

We agree with Merrill Lynch, moreover, that the utility of arbitration would be drastically reduced if an employee were free to relitigate an arbitrated Title VII claim in federal court. We do not see how Congress's explicit endorsement of arbitration can reasonably be read to include a denial of the primary benefit of arbitration, namely, a cost-effective and binding resolution to the dispute. Since we find that the plain language of § 118 at the very least supports the binding and preclusive nature of an arbitrator's award, we

decline to allow wholly ambiguous legislative history to undermine its apparent meaning. *See Citicasters v. McCaskill*, 89 F.3d 1350, 1354 (8th Cir. 1996).

IV.

The MCHR argues that even if Mr. Hoskins is barred from personally reasserting his arbitrated claims in court, the MCHR is not precluded from proceeding with its administrative action against Merrill Lynch on the basis of Mr. Hoskins's claims. The MCHR contends that the lack of identity and the lack of common interests between the MCHR and Mr. Hoskins prevent the ordinary principles of *res judicata* and collateral estoppel from binding the MCHR.

We recognize that there is some tension between, on the one hand, the interest in enforceable arbitration agreements and, on the other hand, the interest in independent enforcement of anti-discrimination laws on behalf of the public by agencies such as the MCHR. We agree, however, with the approach to this difficulty that was taken in *Equal Employment Opportunity Commission v. Kidder, Peabody and Company, Inc.*, 156 F.3d 298, 302 (2nd Cir. 1998), which held that in circumstances similar to ours, an arbitration agreement precludes the EEOC from seeking purely monetary relief for an employee but does not preclude it from seeking injunctive relief.

A claim for monetary relief such as back pay is highly individual in nature, and we thus conclude that when the MCHR seeks such an award, the MCHR acts more as a representative for Mr. Hoskins than as a separate entity seeking to vindicate public rights. *See Kidder, Peabody*, 156

F.3d at 301-02. If the MCHR were seeking injunctive relief for a broad class of employees, on the other hand, its efforts would presumably be aimed at a pattern of ongoing discrimination, and would involve a matter of greater public interest. *See Equal Employment Opportunity Commission v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999) ("[a]lthough the [administrative agency] acts in the public interest, even when enforcing only the charging party's claim, . . . the public interest aspect of such a claim is less significant than an [administrative agency] suit seeking large-scale injunctive relief to attack discrimination more generally").

We recognize that monetary penalties are an important component of the enforcement mechanism of the Missouri Human Rights Act. We emphasize, however, that the arbitration clause in this case does not undermine these statutory penalties: Mr. Hoskins was free to assert all of his statutory claims before the arbitrator, and indeed he did. Under these circumstances, the Supreme Court has found that arbitration is as effective a deterrent, and as effective a method of asserting individual rights, as a judicial proceeding. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) ("'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function'").

V.

The MCHR argues finally that even if both it and Mr. Hoskins could be precluded by a proper agreement to

arbitrate, the agreement in this case was not in fact an "appropriate" agreement, as required by §118. The MCHR refers us to a case that held that although Title VII claims could properly be the subject of an arbitration agreement, Form U-4 did not properly inform the employee that she would be required to arbitrate claims arising out of her employment. *See Rosenberg v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 170 F.3d 1, 19-20 (1st Cir. 1999). We do not see how *Rosenberg* is relevant to our case, however, as Mr. Hoskins submitted his claim to arbitration and pursued it to a resolution. Having already submitted his claim to arbitration, Mr. Hoskins may not now assert that he was not properly apprised of the scope of the arbitration clause in his employment contract. *See Kiernan v. Piper Jaffray Companies, Inc.*, 137 F.3d 588, 594 (8th Cir. 1998). The issue in our case is not whether Mr. Hoskins could be required to arbitrate his claim (he did so voluntarily) but rather what preclusive effect should be applied to the MCHR as a result of that arbitration. Rosenberg never addresses that question.

VI.

The district court enjoined the "defendants" from seeking individual monetary remedies on behalf of Mr. Hoskins. The MCHR is only one of the named defendants but argues that it is entitled to immunity under the eleventh amendment because it is a state agency. We agree.

State agencies acting as "arms" of the state are treated as though they were the state itself, and receive the full immunity from suit described in the eleventh amendment. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf*

*and Eddy, Inc.*, 506 U.S. 139, 144 (1993); *see also Regents of the University of California v. Doe*, 519 U.S. 425, 429-30 (1997). Once the immunity is found to apply, it may be overcome only by a wavier of the immunity by the state, *see Puerto Rico Aqueduct*, 506 U.S. at 144, or, in certain situations, an abrogation of the immunity by Congress. *See Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 640 (2000).

In this case, Merrill Lynch does not dispute the MCHR's contention that it is an arm of the state for eleventh amendment purposes, nor does Merrill Lynch suggest that the state's immunity has somehow been waived or abrogated. Indeed, we note that Merrill Lynch admitted in the district court that the eleventh amendment bars an award of injunctive relief against the MCHR. The discussion of eleventh amendment immunity in the district court's order, however, focused on the propriety of the suit against the individual officers of the MCHR, and never considered the question of whether the MCHR itself was entitled to immunity.

As there is no dispute that the MCHR, as a state agency, is an arm of the state within the meaning of the eleventh amendment, and no indication that either of the exceptions to eleventh amendment immunity applies, we hold that the MCHR is entitled to immunity and should have been dismissed from the suit.

VII.

Despite the fact that it did not file a notice of cross-appeal in this case, Merrill Lynch asks us to modify the

district court's order to enjoin the remaining defendants from seeking any individual injunctive relief for Mr. Hoskins. In *Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985), however, we held that "an appellee that has not filed a cross-appeal . . . may not obtain from us relief more extensive than it received in the District Court." We therefore decline to consider Merrill Lynch's proposed modification of the injunction entered below.

VII.

For the reasons indicated, we affirm the district court's order in part. We vacate the injunction with respect to the MCHR and direct the district court to dismiss the MCHR from the suit. The case is remanded to the district court for proceedings not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

| | | |
|---|---|---|
| Merrill Lynch, Pierce, Fenner & Smith, Inc. | ) | |
| Plaintiff(s), | ) | |
| vs. | ) | Civil No. 98-1168-CV-W-1 |
| Jeremiah W. Nixon, et al. | ) | |
| Defendant(s). | ) | |

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__X__ **Decision by Court**. This action has come before the Court as a briefed matter and a decision has been rendered.

**ORDERED** that Plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive

relief (doc. #9) is **granted** to the extent that it seeks to enjoin the defendant from pursuing monetary damages and denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief. (2) Defendants' motion to dismiss (doc. #8) is **denied**; (3) Defendants' are enjoined from pursuing Case No. E-7/94-12670 or any like claim for individual monetary remedies on behalf of Anthony Hoskins against Merrill Lynch for alleged race discrimination.

May 7, 1999
Date

ROBERT F. CONNOR, CLERK
By: /s/ Y. Johnson
Deputy Clerk

Entered on May 10, 1999

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **Case No. 98-1168-CV-W-8-1** |
| **JEREMIAH W. NIXON, et al.,** | ) | |
| **Defendants.** | ) | |

## ORDER GRANTING IN PART MOTION FOR INJUNCTIVE RELIEF AND DENYING MOTION TO DISMISS

Plaintiff brings this action to enjoin proceedings before the Missouri Commission on Human Rights against it for alleged employment discrimination. Before the Court is (1) plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive relief and (2) defendant's motion to dismiss. For reasons stated below, plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive relief is granted to the extent that it seeks to enjoin the defendant from pursuing monetary damages and denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief. Defendant's motion to dismiss is denied.

I.

Factual Background

Anthony Hoskins ("Hoskins") was terminated from his position as a financial analyst with plaintiff Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") on January 13, 1994. Complaint ¶ 15. Five days later, he filed a Statement of Claim against Merrill Lynch with the National Association of Securities Dealers, Inc. ("NASD") alleging in his Amended Statement of Claim that he was terminated because of his race in violation of Title VII and the Missouri Human Rights Act. Complaint ¶ 17-18. An NASD arbitration panel held hearings on Hoskins' claims and on January 12, 1995, issued an award dismissing Hoskins' claims with prejudice. Complaint Ex. D.

While the arbitration award was pending, Hoskins filed a charge of discrimination with the Missouri Commission on Human Rights ("MCHR") alleging that he had been discharged by Merrill Lynch because of his race. Complaint Ex. C. The MCHR investigated Hoskins' allegations and on September 24, 1996, issued a Finding of Probable Cause thereby determining that probable cause existed to charge Merrill Lynch with terminating Hoskins because of his race. Complaint Ex. E. The Finding of Probable Cause ordered the Executive Director to "immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation, and persuasion." Complaint Ex. E.

On July 8, 1997, the MCHR, through its attorneys Jay Nixon and Keith Halcomb, advised Merrill Lynch that it

intended to hold a public hearing on Hoskins' claims and filed a complaint with the MCHR. In its amended complaint the MCHR sought an order directing Merrill Lynch to cease discriminating against Hoskins and pay him damages. Complaint Ex. F. In response, Merrill Lynch filed a motion to dismiss arguing that (1) because there had been a full and fair arbitration of Hoskins' claims, the Missouri Human Rights Act would be unconstitutional if applied against Merrill Lynch; (2) the action against Merrill Lynch was in violation of 42 U.S.C. § 1983 in that it would deprive Merrill Lynch of its federally protected rights pursuant to the Federal Arbitration Act; and (3) the MCHR's pursuit of an action after full resolution by an arbitration panel was in violation of the common law doctrine of claim preclusion and the Federal Arbitration Act. Complaint Ex. G.

On April 27, 1998, MCHR Hearing Examiner Cynthia A. Quetsch issued her Findings of Facts, Conclusions of Law, and Recommended Decision in which she recommended that Merrill Lynch's motion to dismiss be granted. Complaint Ex. I. Despite Quetsch's recommendation, Merrill Lynch's motion to dismiss was denied by the MCHR. Complaint Ex. J. Thereafter, the MCHR appointed a second Hearing Examiner, John Altergott, and notified Merrill Lynch that it intended to proceed with Hoskins' claims. Complaint Ex. K. The parties were ordered to engage in discovery and a hearing is currently set for July 20, 1999. Complaint Ex. L.

Merrill Lynch has filed a complaint in this Court seeking an Order enjoining the proceedings before the MCHR and for preliminary and permanent injunctions enjoining defendants from the further pursuit of claims against Merrill Lynch for individual remedies on behalf of Hoskins. Merrill

Lynch also seeks monetary damages.

II.

Discussion

The MCHR submits four arguments opposing Merrill Lynch's motion for injunctive relief. First, the MCHR argues that under the "well-pleaded complaint" rule this Court does not have subject matter jurisdiction to hear Merrill Lynch's claims. Second, the MCHR argues that even if this Court has jurisdiction, Merrill Lynch has failed to meet the elements necessary for injunctive relief. Third, the MCHR argues that this Court should abstain from interfering with an ongoing state court proceeding. Fourth, the MCHR argues Merrill Lynch's claims must be dismissed under the Eleventh Amendment. The Court will address each argument.

A. Well-Pleaded Complaint Rule

When jurisdiction is based on a federal question, the "well-pleaded complaint" rule requires that the "federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). Jurisdiction cannot be created by the assertion of a federal defense. See Franchise Tax Bd., 463 U.S. at 14. In declaratory judgments, a complaint is to be tested for federal jurisdiction as if the party whose adverse action the declaratory judgment plaintiff apprehends had initiated a lawsuit against the declaratory judgment plaintiff. See Public Service Commission v. Wycoff Co., 344 U.S. 237, 248 (1952). Thus, if the underlying action is one based on state law, the well-pleaded complaint rule is a barrier to

federal jurisdiction even though the complaint seeking declaratory relief is based on federal law. This is not true, however, when the plaintiff is also seeking injunctive relief. See Shaw v. Delta Air Lines, Inc. , 463 U.S. 85 (1983).

In Shaw, the Supreme Court sustained federal court jurisdiction over a lawsuit in which the plaintiff sought both declaratory and injunctive relief. Although the underlying action was based on state law (whether Delta Airlines violated the New York Human Rights Law by not providing benefits to employees disabled by pregnancy), the Court found that it had jurisdiction to determine whether the New York Human Rights Law was preempted by ERISA.

Although the Court was addressing a preemption issue, it did not rely on the "complete preemption" exception to the well-pleaded complaint rule to establish jurisdiction. Under the "complete preemption" exception, once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. See Schuver v. Mid American Energy Co., 154 F.3d 795, 798 (8th Cir. 1998). Instead, the Supreme Court found that federal jurisdiction existed because plaintiffs were seeking injunctive relief:

> It is beyond dispute that federal courts have jurisdiction over suits to *enjoin* state officials from interfering with federal rights. See Ex parte Young, 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 Led. 714 (1908). A plaintiff who seeks *injunctive* relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the

> Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96 n. 14 (citations omitted). See Fleet Bank, National Assoc. v. Burke, 160 F.3d 883, 888 (2nd Cir. 1998) ("[t]he Supreme Court explicitly upheld subject matter jurisdiction in Shaw on . . . the fact that plaintiffs were seeking injunctive relief to prevent state officials from interfering with a federal right.")

As in Shaw, Merrill Lynch is seeking to enjoin a state agency from encroaching on its rights as provided by the Federal Arbitration Act. Thus, pursuant to Shaw, the well-pleaded complaint rule does not deprive this Court of federal jurisdiction.

B. Injunctive Relief

The MCHR next argues that injunctive relief is not appropriate in this case. Injunctive relief is appropriate if (1) the plaintiff has a reasonable probability of success on the merits; (2) the plaintiff will be irreparably injured if relief is not granted; (3) the potential harm to the plaintiff outweighs any perceived harm to the defendants; and (4) the injunction will not harm the public interest. Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

Whether injunctive relief is appropriate in this case turns on the legal question of whether an arbitration agreement between an employer and employee precludes the MCHR from seeking relief for the employee under the Missouri Human Rights Act. Neither party has submitted a case directly on point, nor has the Court located one. However, the Court finds the Second Circuit's reasoning in

EEOC v. Kidder, Peabody, & Co., Inc., 156 F.3d 298 (2nd Cir. 1998) to be persuasive.

In Kidder, the EEOC sought back pay and liquidated damages for alleged age discrimination on behalf of nine former Kidder employees despite that the employees had agreed to submit any claims arising out of their employment with Kidder to binding arbitration. The Court held that the arbitration agreement precluded the EEOC from seeking monetary relief on behalf of the employees under the ADEA, but that the EEOC could seek injunctive relief.

In reaching its decision, the Second Circuit relied upon the Supreme Court's holding in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). In Gilmer, the United States Supreme Court held that the age discrimination claims of a registered securities representative brought under the ADEA were subject to arbitration in accordance with the registration application the representative submitted to the New York Stock Exchange. The Supreme Court found there was not language in the ADEA that evidenced an intention to preclude arbitration of discrimination claims. Accordingly, the Court concluded that discrimination claims brought under the ADEA could be resolved via binding arbitration. In addressing the effect of its holding on the EEOC, the Supreme Court stated that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide or equitable relief."

Drawing from the holding in Gilmer, the Second Circuit discussed the relationship between an employee's right to pursue an action under the ADEA and the EEOC's pursuit of a separate action raising the employee's claims. Kidder, 156 F.3d at 302. The Second Circuit recognized that the EEOC's right of action is separate from the employee's action. But, that the EEOC does not significantly combat

discrimination by seeking individual monetary relief when an individual has freely contracted to arbitrate his or her discrimination claim. Id. When seeking injunctive relief, however, the EEOC not only protects individual rights, but also the rights of all United States citizens. Id. (citing EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987)). The Second Circuit thus concluded that the EEOC could not seek monetary relief but could seek injunctive relief. Because the EEOC was only seeking monetary relief, the case was dismissed.

Neither Gilmer nor Kidder are directly on point to the resolution of the matter currently before the Court. The decisions of other Eighth Circuit cases, however, make it clear that Merrill Lynch's motion for injunctive relief should be granted to the extent it seeks to enjoin the EEOC from seeking monetary relief. First, although Gilmer involved an ADEA claim, it has been held to apply with equal force to Title VII claims. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997) (holding that under Gilmer Title VII claims are subject to individual consensual agreements to arbitrate). Second, although Kidder involves EEOC proceedings, its reasoning is equally persuasive to MCHR proceedings. See id. (stating that because state anti-discrimination laws that parallel Title VII are explicitly made a part of Title VII's enforcement scheme, the FAA has the same application to claims under the Missouri Human Rights Act (MHRA) as to claims under Title VII). See also Finley v. Empiregas, Inc. of Potosi, 975 F.2d 467 (8th Cir. 1992) ("Our analysis is the same for both the state and federal claims because decisions under the various federal employment discrimination statutes are applicable and authoritative under the Missouri Human Rights Act as well as federal law.").

In light of the Supreme Court's opinion in Gilmer and

the Second Circuit's analysis in Kidder, this Court holds that Merrill Lynch's motion for temporary restraining order, preliminary injunction and other injunctive relief will be granted to the extent that it seeks to enjoin the defendant from pursuing monetary damages and will be denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief.

C. Abstention

Lastly, the Commission argues that the Court should abstain from granting the relief sought by Merrill Lynch because the state would otherwise be denied its right to interpret and enforce Missouri law. Under the line of cases stemming from Younger v. Harris, 401 U.S. 37 (1971), a federal court should not enjoin pending state proceedings where three elements are present: (1) the ongoing state proceedings are "judicial" in nature; (2) the proceedings implicate important state interests; and (3) the proceedings afford an adequate opportunity to raise the federal claims. See Middlesex County Ethics Committee, 457 U.S. 423 (1982).

All three elements required for abstention under the Younger doctrine are met in this case. First, an administrative proceeding, as the one before the MCHR, is "judicial" in nature for purposes of the Younger doctrine. Middlesex County Ethics Committee, 457 U.S. 423 (1982) (applying Younger to administrative proceedings). Second, the state undoubtedly has an interest in protecting its citizens from race discrimination. Third, it is sufficient for Younger purposes "that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Night Clubs Inc. v. City of Fort Smith, Arkansas, 163 F.3d 475, 480 (8th Cir. 1998) (citing Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 629 (1986)).

Nonetheless, even if all three elements are met, a federal court should not abstain if it detects "some extraordinary circumstance that would make abstention inappropriate." Id. at 479. For instance, when an injunction is necessary to prevent great and immediate irreparable injury, a federal court is justified in enjoining a state court proceeding. Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986). A federal court may also interfere with a pending state court proceeding when a federal forum is necessary to redress an alleged deprivation of federal rights. Wooley v. Maynard, 430 U.S. 705, 710 (1977). Lastly, an exception to the Younger doctrine has been found to exist when a "state agency is engaged in a course of action openly inconsistent with a litigant's rights under Section 2 of the FAA . . ." . Olde Discount Corp. v. Tupman, 1 F.3d 202, 214 (3rd Cir. 1993).

Relying upon the Third Circuit's opinion in Olde Discount, this Court finds that the MCHR is engaged in a course of action openly inconsistent with Merrill Lynch's rights under the FAA. If forced to litigate its claim in front of the MCHR, Merrill Lynch will be irreparably harmed in that it will be deprived access to the forum that it and Hoskins contractually chose to resolve their dispute. Accordingly, the Court will not abstain from interfering with the administrative proceeding in this case.

D. Eleventh Amendment

Merrill Lynch concedes that it is barred by the Eleventh Amendment from recovering monetary damages against the MCHR. However, the MCHR insists that the Eleventh Amendment mandates its dismissal from this suit entirely. Contrary to the MCHR's allegations, under Ex parte Young, 209 U.S. 123 (1908), a suit for injunctive relief against a state official may go forward, notwithstanding the

Eleventh Amendment's jurisdictional bar, where as here, the suit seeks to end a continuing federal law violation.

III.

Accordingly, it is **ORDERED** that

(1) Plaintiff's motion for temporary restraining order, preliminary injunction and other injunctive relief (doc. #9) is granted to the extent that it seeks to enjoin the defendant from pursuing monetary damages and denied to the extent that it seeks to enjoin the defendant from pursuing injunctive relief.

(2) Defendants' motion to dismiss (doc. #8) is denied;

(3) Defendants are enjoined from pursuing Case No. E-7/94-12670 or any like claim for individual monetary remedies on behalf of Anthony Hoskins against Merrill Lynch for alleged race discrimination.

/s/ Dean Whipple
DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATE: May 6, 1999
Kansas City, Missouri

Supreme Court, U.S.
FILED
SEP 27 2000
CLERK

(2)

No. 00-317

IN THE

# Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, Attorney General,
State of Missouri, *et al.*,

*Petitioners,*

*v.*

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION

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## STATEMENT PURSUANT TO RULE 29.6

The parent company of the Respondent is Merrill Lynch & Co., Inc., which is the only publicly traded company that owns 10% or more of the stock of the Respondent.

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## PRELIMINARY STATEMENT

One critical fact buried obscurely in the petition for writ of certiorari distinguishes this case from all of the cases relied upon by Petitioners. The arbitration proceeding at issue in this case was initiated by Anthony Hoskins, the alleged victim of race discrimination. Merrill Lynch did not initiate the arbitration, and it did not attempt to force arbitration upon Mr. Hoskins. It merely defended itself from the claim that it had terminated Mr. Hoskins' employment because of his race. The result was a finding that Mr. Hoskins was NOT the victim of race discrimination.

From that single fact, it is clear that this case is NOT about the enforceability of arbitration agreements. It is NOT about whether an employee can be made to submit race discrimination claims to arbitration. It is NOT about whether the state officials herein would be bound by an agreement to arbitrate if an employee resisted arbitration. As both the district court and the Eighth Circuit Court of Appeals recognized, this case is about whether state officials can ignore the decision of an arbitration panel, in an arbitration initiated by the employee, that the employee had NOT been discriminated against, and attempt to obtain the same individualized relief for that same employee, on the same claim of discrimination, in violation of the Federal Arbitration Act, the U.S. Supremacy Clause and the common-law doctrines of *res judicata* and claim preclusion.

No decision of this Court or of any of the Courts of Appeal has permitted such a disregard for established law. As discussed more fully below, the petition for writ of certiorari is without merit and should be denied.

## CORRECTIONS AND ADDITIONS TO PETITIONERS' STATEMENT OF THE CASE

Merrill Lynch clarifies and/or elaborates on the following factual points appearing in Petitioners' Statement of the Case.

First, the arbitration of the underlying claim of race discrimination was initiated by the alleged victim, Anthony Hoskins. On January 18, 1994, Mr. Hoskins, represented by counsel, filed a Statement of Claim against Merrill Lynch with the NASD, invoking arbitration pursuant to the Federal Arbitration Act and his Form U-4 executed pursuant to NASD By-Laws. Shortly thereafter, Mr. Hoskins filed an Amended Statement of Claim with the NASD, asking the arbitration panel: (a) to declare that his employment termination by Merrill Lynch was due to his race and "discriminatory in nature"; and (b) to award him compensatory, exemplary and punitive damages of $4,000,000 "pursuant to 42 U.S.C. § 1981, Title VII, and Missouri Civil Rights Statutes."

An evidentiary hearing on Mr. Hoskins' claim of race discrimination against Merrill Lynch was held before a three-member arbitration panel of the NASD on November 14, 15 and 16, 1994, in which Mr. Hoskins participated and was represented by counsel. On January 12, 1995, the arbitration panel issued its award which provided in part:

AWARD

> After considering the pleadings, the testimony and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators

> have decided in full and final resolution of the issues submitted for determination as follows:
>
> Claimant Anthony H. Hoskins' claims are, and each of them, denied and dismissed with prejudice.

Second, the factual issues in the NASD arbitration initiated by Mr. Hoskins are identical to the factual issues in the charges brought by the Missouri Commission on Human Rights.

Third, the statement in footnote 4 on page 4 of the Petition for Writ of Certiorari is incorrect. The Commission did *not* allege in its Amended Complaint filed September 21, 1997 (which is the operative complaint in these proceedings) that Merrill Lynch discriminated against "Hoskins and other, unnamed employees," nor did it seek relief for "unnamed employees." That Amended Complaint alleged only that Merrill Lynch had discriminated against *Complainant Anthony Hoskins* in connection with his discharge, and sought an order that Merrill Lynch cease discriminating against Complainant and "pay to Complainant a sum of money for actual damages," lost wages, and emotional damage. No allegation of discrimination against any other person or request for any relief on behalf of any other person appears therein. *See* Joint Appendix in the Eighth Circuit Court of Appeals, pages 40-43.

Fourth, when Merrill Lynch asked the Commission to dismiss the Amended Complaint, the Hearing Examiner agreed that the NASD arbitration award was final and binding on the Commission, and recommended that Merrill Lynch's motion to dismiss be granted. Joint Appendix in the Eighth Circuit Court of Appeals, pages 085-091. The Commission refused to accept the recommendation.

Fifth, Petitioners incorrectly state at page 5 that Merrill Lynch asked "the U.S. District Court for the *Eastern* District of Missouri" to enjoin Petitioners from pursuing their Amended Complaint. Instead, Merrill Lynch asked the U.S. District Court for the *Western* District of Missouri for such relief, as was appropriate.

Sixth, as Petitioners state, the district court enjoined the Petitioners from pursuing monetary relief for Mr. Hoskins but permitted the Commission to proceed against Merrill Lynch for injunctive relief. However, at the time of the district court's order, the Commission had sought no injunctive relief on behalf of Mr. Hoskins or any other person and the issue had not been briefed or argued to the district court.[1]

Seventh, in footnote 5 on page 5, the Petitioners acknowledge that Merrill Lynch asserted collateral estoppel and *res judicata* before the district court, but also state that Merrill Lynch did not "assert" those arguments before the Eighth Circuit. This statement is surprising and disingenuous. Merrill Lynch did not raise appeal points with the Eighth Circuit for the obvious reason that it was not the appellant. Merrill Lynch merely responded to the points raised by Petitioners, who contested federal jurisdiction in the Court of Appeals, but did not address the *res judicata* issue. Certainly Merrill Lynch never abandoned the latter. To the

---

1. In a Second Amended Complaint filed with the Missouri Commission on Human Rights on August 31, 1999 — almost four months after the district court's order and therefore, not at issue in these proceedings — Petitioners Jeremiah Nixon and Keith Halcomb asked for an injunction for the first time. That Second Amended Complaint is currently being held in abeyance by the second hearing examiner.

contrary, Merrill Lynch consistently argued to both courts that the Commission could not seek individualized relief for Mr. Hoskins because of the full and fair arbitration hearing which resulted in a decision against him. In response, the Eighth Circuit specifically held, "Under both federal and Missouri law, the principles of *res judicata* and collateral estoppel bar Mr. Hoskins from subsequently relitigating these same claims . . . ." App. A-19 to Petition for Writ of Certiorari.

Eighth, Petitioners state on page 6 that in the Eighth Circuit's holding, the Commission was still permitted to seek injunctive relief. However, the Court of Appeals did not hold that seeking injunctive relief was appropriate. It merely declined to address the point because of the absence of a formal cross-appeal. App. A-24 to A-25 to Petition for Writ of Certiorari.

Ninth, Merrill Lynch invoked the jurisdiction of the federal court under both 28 U.S.C. § 1131 (federal question) and 28 U.S.C. § 1332 (diversity). *See* Joint Appendix in the Eighth Circuit, pages 006-008.

## REASONS FOR DENYING THE WRIT

### I.

### THE EIGHTH CIRCUIT HAD JURISDICTION TO ENJOIN STATE OFFICIALS FROM INTERFERING WITH FEDERAL RIGHTS.

As mentioned above, Merrill Lynch invoked the jurisdiction of the federal court under both 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1332 (diversity). Diversity exists because Merrill Lynch is a Delaware corporation with

its principal place of business in New York. Petitioners are all citizens of Missouri. The amount in controversy exceeds $75,000.

As to federal question jurisdiction, Merrill Lynch claimed that, in attempting to re-determine a discrimination claim on behalf of Anthony Hoskins which had already fully been decided in an arbitration initiated by him, the Petitioners were depriving Merrill Lynch of its rights under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, in violation of the Supremacy Clause of the U.S. Constitution, and were violating the principles of *res judicata* and collateral estoppel. Therefore, Merrill Lynch asked for an injunction to prohibit Petitioners' pursuit of that claim. Both the district court and the Eighth Circuit specifically found that federal jurisdiction existed to resolve Merrill Lynch's claims pursuant to *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983), which states:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. 1331 to resolve.*

(Emphasis added.)

Here, Merrill Lynch sought injunctive relief from application of the Missouri Human Rights Act by state officials in such a way as to ignore a completed arbitration proceeding and thereby interfere with Merrill Lynch's right to engage in meaningful arbitration, a right granted by the Federal Arbitration Act and further protected by the Supremacy Clause.

That the federal courts have jurisdiction to decide whether a state statute, as applied, invalidates arbitration agreements in violation of both the Federal Arbitration Act and the Supremacy Clause was made crystal clear by this Court in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

There, a California court had held that a state law requiring judicial consideration of claims brought under the California Franchise Investment Law did not contravene the Federal Arbitration Act. This Court disagreed, holding both that federal courts have jurisdiction to decide whether application of state law is preempted by the Federal Arbitration Act, 465 U.S. at 8, and that a state law in conflict with the Federal Arbitration Act violates the Supremacy Clause. *Id.* at 16.

Therefore, the argument made by Petitioners that they did not participate in the arbitration agreement here is of no relevance. The point is that they — by their application of a state statute so as to invalidate arbitration already completed and final — attempted to contravene the Federal Arbitration Act and through it, the Supremacy Clause. Such actions fall squarely within the jurisdiction of the federal courts.

Accordingly, the federal courts have jurisdiction over this matter under both 28 U.S.C. § 1331 and 28 U.S.C. § 1332.

## II.

## THERE IS NO SPLIT IN THE CIRCUITS AS TO WHETHER AN ARBITRATION DECISION, REACHED IN ARBITRATION INITIATED BY AN EMPLOYEE AND FINDING THAT NO DISCRIMINATION HAS OCCURRED, IS *RES JUDICATA*.

No discovered case by any court, decided in any circuit, has ever held that after a full and fair arbitration proceeding, initiated by an employee complaining of discrimination, resulting in a finding that no discrimination has occurred and denying all relief, the result is not *res judicata*.

The Eighth Circuit's decision that such an employee does not get a second bite at the apple with the help of an administrative agency seeking identical relief for the same claim is completely consistent with the long-standing judicial policy of finality of judgments, and the "liberal federal policy favoring arbitration agreements." *See Gilmer v. Interstate/ Johnson Lane*, 500 U.S. 20, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 43 (1991).

Petitioners contend that decisions of the Sixth Circuit and Ninth Circuit Courts of Appeal are inconsistent with the Eighth Circuit's decision. That is not the case.

In *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999), it is true that the Sixth Circuit held that the fact that the employee had signed an arbitration agreement did not preclude the EEOC from pursuing

monetary relief on behalf of the employee. However, the court limited its holding at 462 to situations where arbitration had not already taken place, as follows:

> We instead find that principles of preclusion cannot bar the EEOC from suing to "make whole" an individual who has agreed to arbitrate her own claim of discrimination, *where that individual has neither initiated nor participated in an arbitration proceeding in the first place.*

(Emphasis added.)

Here, of course, Mr. Hoskins both initiated and participated in the arbitration proceeding, making the Sixth Circuit decision readily distinguishable.

Likewise, the case of *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S. Ct. 2004 (2000) is factually distinguishable in that no arbitration had been initiated or participated in by the employee. To the contrary, the case involved an employer attempting to compel an employee to arbitrate his claims asserted under a state discrimination statute. Merrill Lynch, of course, is not invoking the Federal Arbitration Act to compel arbitration herein, but is seeking recognition of an arbitration award already entered against the employee, on both statutory and common-law grounds.

The *Circuit City* holding does not address at all the effect of a completed arbitration upon efforts of an administrative agency to relitigate previously determined claims, as is at issue here.

Accordingly, neither the Sixth Circuit nor the Ninth Circuit is at odds with the decision of the Eighth Circuit herein.

## III.

## THIS CASE DOES NOT PRESENT SIGNIFICANT ISSUES THAT ARE IN NEED OF RESOLUTION.

Petitioners contend at pages 14-18 that three issues herein warrant the Court's attention. The issues identified are either non-issues or insignificant, as shown below:

1. ***The Waffle House case is not on point.*** Petitioners are correct that if this Court grants the pending petition for writ of certiorari in the *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert filed*, 68 USLW 3726 (U.S. May 15, 2000) (No. 99-1923), a decision therein would not address the issue in the instant case, namely, whether an arbitration determination that discrimination did not occur, rendered in an arbitration proceeding initiated by the employee, can be ignored by a state administrative agency. That fact alone hardly justifies review of this case. As discussed above, no court from any circuit has endorsed such a disregard for the Federal Arbitration Act and the well-established principles of finality of judgments and *res judicata*.

2. ***State sovereignty is not at issue.*** Contrary to Petitioners' position, the sovereignty of the State of Missouri is not under attack. The Eighth Circuit's decision does not limit the legitimate ability of the Commission to pursue actual damages on behalf of Missouri residents who are victims of discrimination. It limits only the ability of the Commission to pursue actual damages on behalf of persons

who have been found NOT to be the victims of discrimination — a role which even the Commission would have to concede it cannot play.

In addition, although petitioners argue that sovereign immunity under the Eleventh Amendment is at issue, that is hardly the case. As the Eighth Circuit opinion correctly observes (App. A-24 to Petition for Writ of Certiorari):

> In this case, Merrill Lynch does not dispute the MCHR's contention that it is an arm of the state for eleventh amendment purposes, nor does Merrill Lynch suggest that the state's immunity has somehow been waived or abrogated. Indeed, we note that Merrill Lynch admitted in the district court that the eleventh amendment bars an award of injunctive relief against the MCHR.

Accordingly, the Court of Appeals properly dismissed the Commission from the case. (App. A-25 to Petition for Writ of Certiorari.)

That Merrill Lynch's action can legitimately proceed against the remaining individual state officials cannot be seriously contested.

This Court has long recognized that a suit challenging the constitutionality of a state official's action is not one against the State. *Pennhurst State School and Hospital, et al. v. Halderman, et al.*, 465 U.S. 89, 102, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Indeed, "in an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants." *Kentucky v. Graham*, 473 U.S. 159, 169 n.18, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

This is so because, as first held in *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not prohibit the issuance of an injunction when a state official attempts to bring suit to enforce an unconstitutional state statute. Because an unconstitutional enactment is void, it does not impart any immunity from responsibility to the supreme authority of the United States. *Id.* at 160. Under the theory of *Young*, "such a suit would not be one against the State since the federal law allegation would strip the state officer of his official authority," and injunctive relief may properly be issued. *Pennhurst* at 102, citing *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974).

Accordingly, the Eleventh Amendment does not bar the injunctive relief granted herein against the individual defendants.

3. ***Industry wide arbitration agreements are not an exception to the Federal Arbitration Act.*** Petitioners are correct that U-4 agreements are generally required throughout the securities industry. That fact was also true at the time of the decision in *Gilmer v. Interstate Johnson Lane Corp.*, *supra*, in which this Court held that a securities representative's age discrimination claim could be subjected to compulsory arbitration because he had signed an arbitration agreement required of all registered representatives of the New York Stock Exchange. This Court has already determined, then, that industry-wide arbitration agreements are not an exception to the Federal Arbitration Act.

## IV.

## THE DECISION OF THE EIGHTH CIRCUIT IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT.

As they did before the district court and the Eighth Circuit, Petitioners argue that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) holds that an individual such as Mr. Hoskins is entitled to a trial de novo despite an adverse arbitral decision. Petitioners remain incorrect on this point.

In *Gardner-Denver*, this Court only held that where a collective bargaining agreement (CBA) requires arbitration, that requirement need not be fulfilled prior to instigating civil rights litigation.

Almost two decades later, in *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court took up the issue of whether an age discrimination claim could be subjected to compulsory arbitration under the same type of arbitration agreement which Mr. Hoskins signed here. In answering that question affirmatively, this Court gave lengthy consideration to *Gardner-Denver*, ruling specifically that Mr. Gilmer's argument that *Gardner-Denver* "precludes arbitration of employment discrimination claims . . . is misplaced." *Gilmer* at 33.

In so ruling, this Court made the distinction that the holding in *Gardner-Denver* was based in part on the fact that the arbitration there "occurred in the context of a CBA . . . . An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." *Gilmer* at 35. Accordingly, "those cases [*Gardner-Denver* and its progeny]

provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claims."[2]

This distinction was specifically acknowledged in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361, 368-69 (1998), recognizing that the *Gardner-Denver* holding has been applied by this Court in deciding the effect of CBA arbitration agreements upon employee claims, while *Gilmer*, at the very least, has been followed in individually executed contracts.

The *Gardner-Denver* progeny referred to in *Gilmer* as not providing a basis for refusing to enforce an individual agreement to arbitrate ADEA claims, are the same cases which Petitioners now argue at page 20 of their petition support the conclusion that arbitration decisions do not have a preclusive effect. This Court discussed both *McDonald v. City of West Branch, Michigan*, 450 U.S. 284 (1984) and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) in *Gilmer*, and explained at 35 why their holdings are not applicable to individual claims such as Mr. Hoskins':

> Barrentine and McDonald similarly involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent statutory claim. In holding that the statutory claims there were not precluded, we noted, as in

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2. In *Gilmer*, the Court also noted at page 34 n.5 that *Gardner-Denver* had been decided when arbitration was viewed as "inferior to the judicial process for resolving statutory claims." Such a view, this Court stated, "has been undermined" by more recent arbitration-related decisions. "We are well past the time when judicial suspicions of the desirability of arbitration . . . inhibited the development of arbitration as an alternative means of dispute resolution."

> *Gardner-Denver*, the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.
>
> There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims*, and the labor arbitrators were not authorized to resolve such claims, *the arbitration in those cases understandably was held not to preclude subsequent statutory actions*.

(Emphasis added.)

Because Mr. Hoskins agreed to (and did) arbitrate his statutory claims, *Barrentine* and *McDonald* are likewise inapplicable here, and in no way conflict with the Eighth Circuit's decision.

Likewise, Petitioners' reliance on *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) is misplaced. That case only held that the EEOC may seek classwide relief under Title VII without being certified as the class representative under Rule 23 of the Federal Rules

of Civil Procedure. None of the plaintiffs in that case had already arbitrated (and lost) their discrimination claims.

The only case suggesting the effect upon an administrative agency when a claimant has already arbitrated and lost is *Gilmer* itself. In recognizing that ADEA claims may be the subject of arbitration agreements, this Court commented at 32, "it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." By implication, then, arbitration agreements will preclude the EEOC from bringing actions seeking monetary relief. And if a mere *agreement* to arbitrate can preclude the EEOC from seeking monetary relief, then *a fortiori*, a completed arbitration determining that discrimination did NOT occur will preclude any relief (monetary, injunctive or otherwise) which would be premised on a finding that discrimination did occur.

## CONCLUSION

No decision of this Court or any Court of Appeals has held that when a claimant voluntarily initiates and participates in arbitration of a discrimination claim and the result is an arbitral determination that discrimination did not occur, that determination is of no preclusive effect upon an administrative agency seeking the same relief for the same claimant on the same claim. Accordingly, there is no split in the circuits on this issue, and the Eighth Circuit's decision is not inconsistent with the decisions of this Court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 00-317

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Jeremiah W. (Jay) Nixon, Attorney General,
State of Missouri, et al.,
Petitioners,

v.

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

# REPLY BRIEF FOR PETITIONER

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No. 00-317

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**In the**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 2000**

---

**Jeremiah W. (Jay) Nixon, Attorney General, State of Missouri, et al.,**

**Petitioners,**

**v.**

**Merrill Lynch, Pierce, Fenner & Smith, Inc.,**

**Respondent.**

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

---

# REPLY BRIEF FOR PETITIONER

---

At the eleventh hour, respondent would have this Court place heavy focus upon *res judicata*. But the case is not about *res judicata*. It is about a federal court's authority to pick and choose a state agency's remedies in an enforcement proceeding, based on state anti-discrimination laws, against a private employer. Respondent's efforts to point to *res judicata* or to diversity – two among the 13 "corrections," "additions," and points contained in Respondent's Brief in Opposition ("Opp.") – lack merit, as do Respondent's characterization of the scope of the matter

before the Missouri Commission on Human Rights (Commission), and the import of the pending petition for writ of certiorari in *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 USLW 3726 (U.S. May 15, 2000) (No. 99-1823).

1. Respondent's invocation of *res judicata* addresses neither the district court's lack of subject matter jurisdiction nor any of the other reasons this Court should grant the petition. Those frequent invocations (*e.g.*, Opp. at 1, 4, 5, 6, 8, and 10) demonstrate Respondent's determination to avoid responsibility to anyone but a single employee. Respondent cannot answer the jurisdiction question because *res judicata* does not in itself establish a federal question.

The Eighth Circuit – and, at one time, Respondent – understood that Respondent was required to find some federal question to permit the case to proceed in federal court. App. A-18. The court of appeals held that the requisite federal question resided in the Federal Arbitration Act, reasoning that the Act creates a federal right for employers with which the Commission would interfere. App. A-18. Thus, in arguing its position below, Respondent made only passing and implicit reference to the defense of *res judicata* (*see* Brief of Appellee, pp. 26, 28), relying instead on the position it now disavows: that it could invoke the Arbitration Act as the source of a federal question (*see* Opp. at 9). Perhaps Respondent failed to more fully elaborate on its *res judicata* theory because a full-blown *res judicata* analysis would have revealed the inapplicability of the defense against one not a party to the prior proceeding.[1]

---

[1] Or perhaps Respondent gave its theory short shrift because it elected not to cross-appeal that portion of the district court's judgment permitting the remaining defendants to seek injunctive relief. App. A-24 — A-25. If the district

With regard to Respondent's prior reliance on the Arbitration Act to support its claim of jurisdiction, noticeably absent from Respondent's presentation to this Court is any discussion of *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983), a case in which this Court specifically held that the Arbitration Act is not a jurisdictional statute. That Act, the Court held, creates no "independent federal question jurisdiction." *Id.* Respondent's decision to ignore that precedent is particularly striking in view of its heavy reliance on *Southland Corp. v. Keating*, 465 U.S. 1 (1984), to support its argument that the federal courts must have jurisdiction where a party invokes the Arbitration Act. Opp. at 7. To borrow Respondent's phraseology, what is "crystal clear" about *Southland* is that it takes a view opposite to that of Respondent: the Court reaffirmed the holding of *Moses H. Cone* that the Arbitration Act "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland*, 465 U.S. at 16 n.9, *citing Moses H. Cone*, 460 U.S. at 25 n.32.

In fact, what this Court reviewed in *Southland* was not even a federal court case; rather, it involved the parties to franchise contracts that contained arbitration clauses, and the franchisor's state court enforcement proceedings against its franchisees. *Id* at 3-4. Though the facts in *Southland* are not particularly relevant, the holding only reinforces the Commission's position.

2. In another tack away from the issue of federal question jurisdiction that this case presents, Respondent suggests Petitioners overlooked diversity as an independent basis for the federal court's jurisdiction. Opp. at 5-6. But Respondent sued only a state agency and, in their official

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court had applied *res judicata* (which it did not), it would also have barred injunctive relief.

capacities, state officials. Such defendants are not "citizens" for purposes of establishing diversity. *E.g., Northeast Fed. Credit Union v. Neves*, 837 F.2d 531, 533 (1st Cir. 1988) (and cases cited therein).

3. Respondent confuses the relief the Petitioners seek. The Petitioners always sought injunctive relief, as well as victim-specific remedies such as back pay and damages. That was true from the beginning of the underlying Missouri Commission on Human Rights proceeding: the initial complaint prayed for an order of injunctive relief, *i.e.*, for an order that Respondent "cease and desist [its] unlawful and discriminatory acts." Joint Appendix in the Eighth Circuit, App. 42. And after the case had been more fully developed, the Petitioners sought, and were granted, leave to file a second amended complaint.[2] The second amended complaint alleged that Respondent discriminated against Anthony Hoskins and other employees, causing them lost wages and other injuries. Among other things, the second amended complaint prayed for an order that Respondent "cease and desist [its] unlawful and discriminatory acts," and for the entry of such other orders as are "just and proper under the circumstances...." *See* Second Amended Complaint in file of Missouri Commission on Human Rights, *State ex rel. Nixon v. Merrill Lynch*, no. E-07/94-12670.

4. Finally, Respondent argues that *Waffle House* is not squarely on point and thus dismisses the importance of the EEOC's pending petition for writ of certiorari. Opp. at

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[2] A special hearing examiner granted the Commission's motion to file a second amended complaint, stating in an order filed October 25, 1999, that "said second amended complaint is deemed filed." *See* file of Missouri Commission on Human Rights, *State ex rel. Nixon v. Merrill Lynch*, no. E-07/94-12670.

10. Precisely. *Waffle House* is narrower than the instant case. As discussed in the Petition, this case presents an opportunity to fill in detail that the *Waffle House* case does not permit. Most important, *Waffle House* does not address the essential question posed here: the propriety of the use of cases such as *Ex Parte Young*, 209 U.S. 123 (1908), as a basis for permitting the federal courts to micro-manage the states' statutory enforcement efforts. *See* Opp. at 11-12. Certainly the mere invocation of *Ex Parte Young*, a case that provides a vehicle to prevent state actors from taking unconstitutional actions, does not alone establish the necessary federal question jurisdiction, any more than, for example, the mere invocation of "42 U.S.C. §1983."

## CONCLUSION

For the reasons stated in this reply, coupled with those found in the petition, the Court should grant the petition for writ of certiorari, and either summarily reverse the court of appeals' holding that it had subject matter jurisdiction, or set this matter for briefing and argument, instead of or alongside *Waffle House*.

Respectfully submitted,

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